89-829

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

DEWITT BANK AND TRUST COMPANY,
CONSERVATOR OF THE ESTATE OF
WILLIAM LANCE McNEELY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(A) Whether the Flood Control Act's immunity provision in 33 U.S.C. 702(c), which states that "no liability of any kind shall attach to or rest upon the United States for any damages from or by flood or flood waters at any place," bars recovery where the federal government would otherwise be liable under the Federal Tort Claims Act, 28 U.S.C. § 2674, et seq., for personal injuries caused by the United States Army Corps of Engineers' negligence in constructing and operating an ultra-hazardous condition at a designated swimming area, as a recreational facility, to induce people to use a public park situated at a natural lake used for navigation and recreational purposes.

(B) Whether the Eighth Circuit Court of Appeals' disregard of the trial court's findings, applying the Arkansas Recreational Use Statute, that conditions at the swimming area were ultra-hazardous and were the proximate cause of plaintiff's injuries, is in violation of Rule 52(a), Federal Rules of Civil Procedure, and the "clearly erroneous" standard of review.

PARTIES

Petitioner is DeWitt Bank and Trust Company, Conservator of the Estate of William Lance McNeely.

The defendant is the United States of America.

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, DeWitt Bank and Trust Company, Conservator of the Estate of William Lance McNeely, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on June 26, 1989.

OPINIONS BELOW

The opinion and order of the United States District Court, which is not reported, appears in Appendix A, pages App. 1-17. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 878 F.2d 246 and appears in Appendix B, pages App. 18-21. Petition for rehearing and rehearing en banc was denied, and the Eighth Circuit Court of Appeals' Order Denying Petition for Rehearing and Suggestion for Rehearing En banc appears in Appendix C, page App. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 26, 1989. Appendix B, *infra*. Appellee's timely petition for rehearing and suggestion for rehearing *en banc* was denied by Order of the Court of Appeals entered on September 7, 1989 (Judge Theodore McMillian *dissenting*). Appendix C, *infra*. This Petition is filed within 90 days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

Title 33 U.S.C. §702c, provides as follows:

§702c. *Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights.*

Except when authorized by the Secretary of War [Secretary of the Army] upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War [Secretary of the Army] that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4 [33 USC §702d]; (c) provide, without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War [Army] and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or

floodage rights over such lands. (May 15, 1928, ch 569, §3, 45 Stat. 535.)

Title 28 U.S.C. §2674 provides in relevant part:

§2674. *Liability of United States*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages . . . (June 25, 1948, c. 646, §1, 62 Stat. 983.)

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure provides in relevant part:

Rule 52. *Findings by the Court*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

ARKANSAS STATUTE INVOLVED

Ark.Code Ann. §18-11-307. *Exceptions to Owner's Immunity.*

Nothing in this subchapter limits in any way liability which otherwise exists:

(1) For malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous . . .

THE QUESTION IS SUBSTANTIAL

Title 36, Parks, Forests and Public Property, Chapter III – U.S. Army Corps of Engineers, Part 327 – "Rules and Regulations Governing Public Use of Water Resources Development Projects Administered by the Chief of Engineers," Section 327.1, provides:

327.1. *Policy*

(a) It is the policy of the Secretary of the Army acting through the Chief of Engineers, to manage the natural, cultural and developed resources of each project in the public interest, *providing the public with safe and healthful recreational opportunities* while protecting and enhancing these resources. (Italics supplied.)

In execution of this policy, the Little Rock District of the Corps of Engineers had a designated Chief of Recreation Resource Management, constructed Merrisach Lake Park, charged fees for using the park's camping facilities, and constructed and operated a beach and swimming area as an attraction for people to use the public park.

Four young men, including the petitioner's ward, sustained severe spinal cord injuries diving into the water at the designated swimming area at Merrisach Park beach. Three of these young men are paraplegics.

The trial court found: *"There is no real issue as to the causal relationship between the conditions and the injury."* (Italics supplied.) (Appendix A, page 15.)

Petitioner filed a claim under the Federal Tort Claims Act, Title 28 U.S.C. §2674. The government claimed immunity *under the Arkansas Recreational Use Statute* (See Appendix A, pages 5-8.) The trial court, applying the Arkansas Recreational Use Statute, found the government liable under the exemptions to owners' immunity (Appendix A, page App. 10-15). Appealing the findings and order of the trial court, the government for the first time claims immunity under the Federal Flood Control Act, Title 33 U.S.C. §702c.

The ruling of the Eighth Circuit Court of Appeals, reversing the findings and order of the trial court, is in conflict with:

Denham v. United States, 834 F.2d 518 (5th Cir. 1987).

Hayes v. United States, 585 F.2d 701 (4th Cir. 1978).

Graci v. United States, 456 F.2d 20 (5th Cir. 1971).

Anderson v. City of Bessemer City, 470 U.S. 564 (1985).

The Eighth Circuit Court of Appeals' reliance on *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988), is misplaced.

STATEMENT OF THE CASE

William Lance McNeely was injured when he dove into shallow water in an effort to save a friend. As a result of these injuries, he is a quadriplegic.

McNeely's injuries occurred at a designated swimming area at Merrisach Lake Park. The park is owned and operated by the United States Corps of Engineers. The swimming area at Merrisach Lake Park was built and maintained so as to induce patrons to use the park.

Merrisach Lake was not built by the Corps of Engineers as part of a flood control project. Merrisach Lake is a natural lake which existed before the Arkansas Navigational System on the Arkansas River was constructed. The Arkansas Post Canal was constructed across the old Merrisach Lake by the Corps of Engineers for the purpose of providing navigation connecting the Arkansas and the Mississippi Rivers. Dam No. 2, a link in the Arkansas Navigational System, maintains a pool of water above the dam designated as Pool No. 2 which maintains sufficient depth to provide a nine-foot navigational channel through the Arkansas Post Canal which transverses Merrisach Lake.

Four young men, including Lance McNeely, sustained spinal cord injuries – three of them are paraplegics – diving from the retaining wall at a designated swimming area built and operated by the U.S. Army Corps of Engineers.

Merrisach Park and Merrisach Lake beach were built on the east shore of the Merrisach Lake. Merrisach Lake is a natural lake used for boating, fishing, swimming and other recreational activities. Merrisach Park consists of 60 acres created for recreational purposes, having 70 camping sites. A fee is charged by the Corps of Engineers for the use of the camping facilities. The United States Corps of Engineers hauled sand and built the beach

behind a retaining wall at Merrisach Park. The beach was maintained " . . . *because that was the main thing that drew people down to that area.*" (T49-51.)

The water at the beach area is always muddy, shallow, averaging two to two and a half feet in depth. The trial court found:

> As constructed with the platform retaining wall, the ladder suggestive of substantial depth, and murky river water (which made walking on a hidden bottom precarious), shallow diving was invited, rather than deterred. The water depth outside the retaining wall averaged two and one half feet and was subject to fairly rapid 6" drawdowns, that is, 1/5 of the already inadequate depth could be lost in a few hours. There were no depth gauges installed in the swimming area . . . (Appendix A, pages 12-13.)

Lance McNeely filed a claim against the government under the Federal Tort Claims Act, 28 U.S.C. §2674. The government, as an affirmative defense, pled immunity from liability under the provisions of the *Arkansas Recreational Use Statute*, which provides:

> Ark.Code Ann. §18-11-304. *Duty of Care.*
>
> Except as specifically recognized by or provided in §18-11-307, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure or activity on the premises to persons entering for recreational purposes. (Appendix A, page 6.)

Ark.Code Ann. §18-11-307. *Exceptions to Owner's Immunity.*

> Nothing in this subchapter limits in any way liability which otherwise exists:
>
> (1) For malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous . . . Appendix A, page 7.)

The trial court, applying the exceptions to owners' immunity under the Arkansas Recreational Use Statute, found the government liable for failure to guard and warn against an ultra-hazardous condition from which malice must be inferred. (Appendix A, page 14.)

The trial court, after hearing the testimony, examining the documents, visiting the scene, and applying the Arkansas Recreational Use Statute, entered a judgment in favor of Lance McNeely.

The United States District Judge trying the McNeely case found as facts:

> This litany of open and obvious defects, easily apparent to any qualified administrator of a recreational area, compels this Court to conclude that the swimming area, as constructed and maintained, demonstrated, on the part of the Corps of Engineers, a conscious indifference to consequences from which malice must be inferred.
>
> This Court also concludes that there was a failure to guard and a failure to warn against the condition, which was so extreme as to be an ultra-hazardous condition. As to the question of actual notice, there is no question that the administrators, including the Park Rangers, knew of the condition, because they all testified

as to examining the area and their familiarity with it.

The Deputy Sheriff, who by agreement with the Corps of Engineers patrolled the park, testified that he often saw diving, that he warned the Park Rangers of the hazardous nature of the swimming area.

Bittner, the man who fractured his spine in 1978, testified that some months later, when he returned to the park, a Ranger came to him and opened a conversation with an inquiry if he was the fellow who got hurt.

The obvious nature of the hazards, coupled with the repeated presence of Rangers and administrators at the swimming area, even without the evidence of specific conversations as to the dangerous nature of the structures and area, convinces this Court that responsible personnel of the Corps of Engineers had actual knowledge of the danger.

There is no real issue as to the causal relationship between the conditions and the injury. (Appendix A, page 14-15)

The government, at the trial of the case, claimed immunity under the Arkansas Recreational Use Statute as a landowner engaged in *recreational activities*. On appeal, for the first time, it invoked immunity under the Flood Control Act, contending that its activities were *related to flood control*.

ARGUMENT

1.

The opinion of the Eighth Circuit Court of Appeals in McNeely is in direct conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Denham v. United States*, 834 F.2d 518, 521 (5th Cir. 1987), where the Court held:

> We do not believe that Congress intended one who was injured because of a danger negligently created by the Corps within a designated swimming area to have no legal remedy.

Denham was injured when he dove into shallow water, striking his head on a concrete anchor in a designated swimming area at Temple Park Lake, which was part of a flood control reservoir operated by the Corps of Engineers. The trial judge, in *Denham*, 646 F.Supp. 1021 (W.D.Tex. 1986), distinguished *Denham* from *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986):

> The United States Supreme Court recently construed §702c in *United States v. James, supra. James* involved two instances where individuals while participating in recreational activities were drawn through the retaining structures of a flood control project. See id. at 3118-19. The basis of the complaint in *James* was that the United States was both negligent and grossly negligent in failing to post signs or buoys warning boats and recreational users from getting too near the retaining structures during discharge. See id. at 3119. The Supreme Court found that it was the release of the waters from the flood control project which caused the injuries, not the failure to warn, as alleged by the Plaintiffs. See id. at 3124. As such, the Supreme Court held

> that the Government was immune from liability because the damage was caused "by flood or flood waters" and that the immunity provision of the Flood Control Act applied. See *James* at 3124-25.

The trial court, in *Denham*, discussing the "causation" issue stated:

> The next issue to be addressed by the Court is whether Robert Denham's injuries were proximately caused by the operation of the dam as a flood control project or were the result of the dam's operation as a recreational facility. In *United States v. James*, the Supreme Court quoted a Fourth Circuit case and emphasized the following language:
>
> > If the Plaintiff could prove damage . . . as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of §702c. *United States v. James*, ___U.S.___, 106 S.Ct. 3116, 3122, n.7, 92 L.Ed.2d 483 (1986) citing *Hayes v. United States*, 585 F.2d 701, 702-03 (4th Cir.1978).
>
> *Accordingly, the Court is of the opinion that the instant case is unlike the situation in James in that the injuries sustained in James occurred as a result of a dam's operation as a flood control project; whereas the injury to Robert Denham arose out of the dam's use as a recreational facility.* (*Denham*, page 1026) (Emphasis supplied.)

In *James*, the Millwood Reservoir, having reached flood stage, the Corps of Engineers released the flood waters by opening the flood gates without warning the claimants who were skiing above the dam. The claimants were injured when they were swept through the flood

gates. The United States Supreme Court held that §702c of the Flood Control Act provided the government immunity from liability, stating that:

> Respondents injuries occurred as a result of the release of waters from reservoirs that had reached flood stage. (*James v. United States*, page 3121, *supra*.)

A reading of §702c suggests that immunity from liability would apply to property damages from flood waters. However, the Supreme Court, in *United States v. James*, construed this section to provide governmental immunity from liability for personal injuries caused from or by "flood" or "flood waters." The majority opinion in *James*, in interpreting the intent of Congress in its passage of §702c, was seriously challenged in a dissenting opinion by Justice Stevens. Joined by Justices Marshall and O'Connor, he stated:

> . . . It defies belief – and ascribes to the Members of Congress a perverse, even barbaric, intent – to think that they spent days debating the measure of extraconstitutional compensation they would provide riparian landowners but intended – without a single word of dissent – to condemn the widows, orphans, and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act.

The injuries to the claimants in *James* caused by opening the flood gates to release flood waters clearly involved the operation by the Corps of Engineers of a ***flood control project***. In the case at bar, the Corps of Engineers was involved in the operation of a *recreational* ***project***:

1. The Corps of Engineers built a recreational park and charged a fee to the public for the use of the camping facilities;

2. The Corps of Engineers built a beach in order to induce the public to use the park;

3. Swimming and diving were invited in the beach area.

The trial court found as follows:

(1) I find there is substantial evidence of "conscious indifference to the consequences from which malice" must "be inferred". The United States acting through the Corps of Engineers, *in its layout, construction and administration of the swimming area* paid little or no attention to any of the most elemental safety standards . . . (Emphasis supplied.) (Appendix A, page 12.)

(2) *As constructed,* with the platformed retaining wall, the *ladder suggestive of substantial depth,* and *murky river water . . . , shallow diving was invited rather than deterred.* The water depth outside the retaining wall averaged 2½ feet, and was subject to fairly rapid 6" draw downs, i.e., 1/5th of the *already inadequate depth* could be lost in a few hours . . . (Appendix A, page 12.)

(3) This litany of open and obvious defects, easily apparent to any qualified administrator of a *recreational area,* compels this Court to conclude that the swimming area *as constructed and maintained* demonstrated, on the part of the Corps of Engineers, a conscious indifference to consequences from which malice must be inferred. (Appendix A, page 14.)

(4) This Court also concludes that there was a *failure to guard and a failure to warn against the*

> *condition, which was so extreme as to be an ultra-hazardous condition . . .* (Appendix A, page 14.)
>
> (5) *There is no real issue as to the causal relationship between the conditions and the injury.* (Italics supplied.) (Appendix A, page 15.)

There is nothing in §702c of the Flood Control Act from which it can be inferred that the government is immune from liability for negligently constructing and operating an ultra-hazardous condition at a recreational park.

2.

The Eighth Circuit Court of Appeals' decision in *McNeely* is also in conflict with the Fourth Circuit Court of Appeals in *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978).

In *Hayes*, the Plaintiff sought damages from the United States for erosion of a river bank and flooding of the low lying areas of his farm located on the Yadkin River downstream from the Kerr Scott Dam. It is alleged that the damage to the farm was caused by the operation of the dam's flood gates. The District Court dismissed the action under F.R.C.P. Rule 12(b)(6) for failure to state a claim, relying upon the immunity granted the United States by 33 U.S.C. §702, from liability for damage from flooding or flood waters.

The Fourth Circuit Court of Appeals, in *Hayes*, reversing the trial court, held:

> [1] Since the purpose of §702c was to insulate the federal government's activities in aid of flood control, after enactment of the Federal Tort

> Claims Act the reach of the §702c immunity has been confined to damage from flooding which allegedly occurred because of the government's anti-flooding activity. There is no immunity for flooding caused by a federal project unrelated to flood control. [*Graci v. United States*, 456 F.2d 20 (5th Cir. 1971)].
>
> [3] The plaintiff here alleged that the Kerr Scott Dam was a dual purpose dam designed to be operated as a flood control facility and to provide recreation for members of the public. It is not alleged why the flood gates were opened from time to time, and in its answer the United States did not address the subject. One may assume that all of the releases, or most of them, were incidental to the dam's operation as a flood control facility, but absolute dismissal on the basis of Rule 12(b)(6) should not be premised upon mere assumption. It is not inconceivable that all or some of the releases were solely for the purpose of promoting recreational use of the impounded waters and not in the least in aid of the operation of the dam as a flood control facility. If the plaintiff could prove damage to his farm as a result of the dam's operation as a *recreational facility without relation to the operation of the dam as a flood control project*, he would avoid the absolute bar of §702c. (Emphasis supplied.)

The Eighth Circuit Court of Appeals' opinion that the operation by the Corps of Engineers of a flood control project was a substantial factor in Lance McNeely's injuries is in conflict with the evidence and the findings of the trial court. The construction of the Merrisach Park and the Merrisach Park beach by the Corps of Engineers was constructed in compliance with "the policy of the

Secretary of the Army, acting through the Chief of Engineers, to manage the natural, cultural and developed resources of each project in the public interest *providing the public with safe and healthful recreational opportunities . . .* " (Title 36, Chapter III, Part 327, *supra.*)

The trial court found the operation of the swimming area at Merrisach Lake to be a recreational facility and applied the Arkansas Recreational Use Statute.

No interpretation of the facts in this case supports the view that the shoreline operation of the Merrisach Park and the Merrisach Park beach, as a recreational facility, was related to the Corps of Engineers' flood control functions on the channel of the Arkansas Navigational System.

3.

The Eighth Circuit Court of Appeals' opinion is in conflict with the Fifth Circuit Court of Appeals' opinion in *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971).

In *Graci*, the plaintiffs claimed damages from high or flood water discharged from the navigation channel constructed by the Corps of Engineers from the Mississippi River to the Gulf of Mexico. This was a *navigation* project. The complaint charged that, before the construction of the outlet, the plaintiffs' properties had been free from hurricane-driven waters, but that, as a proximate result of the construction of the outlet, plaintiffs' properties were exposed to the effects and encroachments from storm-driven waters. The plaintiffs alleged that the government had been negligent in the construction, planning and operation of the navigation channel. The government

pled as a defense the flood control immunity statute. In sustaining the district judge's award of damages to the plaintiffs, the Fifth Circuit Court of Appeals held:

> [3] Judge Heebe concluded that §3 should not be construed to be a wholesale immunization of the Government from all liability for floodwater damage unconnected with flood control projects. 301 F.Supp. at 951. Based on our reading of the Act, its scant legislative history, and the *Peterson, Parks, McClasky,* and *Valley Cattle* cases, we are constrained to agree. *In Judge Heebe's words, it is simply impossible to accept this immunity provision, reasonably related to government involvement in flood control programs, as an absolute insulation from liability for all wrongful acts in other situations, contrary to the express policy of the Federal Tort Claims Act that the government should be held liable for the wrongful acts of its employees in the same respect as private persons.* (Emphasis supplied.)

In the case at bar, Chester Lee Shaw, Deputy Director for the Corps of Engineers for the Little Rock District, testified as follows:

> Q. Mr. Shaw, in regard to Merrisach Lake, was it a natural lake existing before construction of the navigation facilities?
>
> A. Yes, sir. A lake was there before the navigation system was constructed. The navigation – Arkansas Post Canal – was constructed across the old Merrisach Lake (T237).
>
> Q. Alright. What is the *purpose* of that canal, Mr. Shaw?

> A. The purpose of the canal is, in fact, to *provide navigation access to the Mississippi River*. The actual navigation on the Arkansas River comes up the White River from the Mississippi, approximately 10 miles, and then it's a man-made canal from the White River over to the Arkansas River, and the canal provides access to the White River (T238). (Emphasis supplied.)

4.

The Eighth Circuit Court of Appeals' reliance on *McCarthy v. United States*, 850 F.2d 558 (9th Cir.), is misplaced.

McCarthy was injured at East Copperas Park on Lewisville Lake in Texas when he made a shallow dive, striking his head on the bottom of the lake.

The Ninth Circuit Court of Appeals, in *McCarthy*, found that:

> 1. Lewisville Lake was constructed by the Corps of Engineers "in the interest of flood control." (p. 559)
>
> 2. East Copperas Park does *not* have a designated swimming area. Its facilities include picnic tables, a boat ramp, and vehicle parking areas. There is *no use charge* at the park. (p. 559)

The Ninth Circuit, in *McCarthy*, held:

> In this court, the immunity provision of 702c does not apply when the damage is unrelated to an act of Congress authorizing the expenditure of federal funds for flood control or to any undertaking pursuant to any such authorization.

McCarthy v. United States has no relevance to the case — at bar:

1. Merrisach Lake is a natural lake. It was not constructed by the Corps of Engineers.
2. The Merrisach Lake is used for recreational and navigational purposes.
3. Fees were charged by the Corps of Engineers for the use of camping facilities at Merrisach Lake Park.
4. The Corps of Engineers built a designated beach and swimming area at Merrisach Park as an inducement for the public to use the park facilities.
5. The funds used to build Merrisach Park and beach were unrelated to funds appropriated by Congress for the control of "floods" and "flood waters."

5.

The Eighth Circuit Court of Appeals' opinion in the case at bar contravenes Rule 52(a), Federal Rules of Civil Procedure, and is in conflict with the case of *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985).

Rule 52(a), Federal Rules of Civil Procedure, provides as follows:

> Rule 52. *Findings by the Court.*
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . Findings of fact, whether based on oral or documentary evidence, shall not

> be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

The trial court, in *Anderson v. City of Bessemer City, supra,* found that petitioner had been a victim of discrimination. The Fourth Circuit Court of Appeals reversed the findings of the trial court. The Supreme Court of the United States, in reversing the findings and conclusions of the Fourth Circuit Court of Appeals, held:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. [United States v. Yellow Cab Co., 330 U.S. 328, 342.] [See also *Lindwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).]

In applying the Arkansas Recreational Use Statute, the trial court found that the Corps of Engineers, in constructing and operating the Merrisach beach and swimming area, was engaged in a recreational activity and that there was no real issue as to the causal relationship between the conditions at this recreational facility and the injury. The trial court's findings were a "permissible view" of the evidence and not clearly erroneous.

CONCLUSION

1. *The case at bar presents a substantial question of significant public interest.*

2. *The Circuit Courts of Appeal are in conflict on this issue.*

3. *The findings of the trial court were not clearly erroneous.*

To hold that it was the sense of Congress, in passing the ~~Federal~~ Flood Control Act, to deny relief to citizens wrongfully injured by government employees at a designated swimming area, is to ascribe to the members of Congress, who subsequently passed the Federal Tort Claims Act, an undeserved malevolence.

WHEREFORE, petitioner prays that its petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Dewitt Bank & Trust Company,
Conservator of the Estate of
William Lance McNeely,

Plaintiff,

vs.

CIVIL NO. PB-C-86-0213
(Filed May 27, 1988)

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

This action is brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The claim being cognizable under § 1346(b) is subject to the administrative remedy provided in 28 U.S.C. § 2675(a). The requisite filing and rejection by non-action have occurred so this Court has jurisdiction, Driggers v. United States, 309 F.Supp. 1377 (D.S.C. 1970).

FACTS

The Arkansas River is navigable with a nine foot channel throughout Arkansas. It carries a heavy load of silt and creates a delta at its point of confluence with the Mississippi River. In order to keep the channel open and exercise some flood control, the United States Corps of Engineers has dug a canal eastward from the Arkansas River to the White River, which carries less silt in a more confining valley. The traffic then goes down the White River into the Mississippi. The canal is laid through the

Merrisach Lake, which was originally a narrow east-west lake, but by virtue of canal flooding is extended into a generally north-south lake. The water which fills the canal and the lake is retained by Norrell Dam Number 2, about two miles downstream from the west end of the canal, on the Arkansas River; and Norrell Lock Number 2, about 4½ miles downstream from the west end of the canal, on the canal (Plaintiff's Exhibit 1A).

A point of land extends out into the lake from its southeast corner, with the canal running along the point's south side and the lake lying to the west and the north of the point. On this point of land, and the land lying north and east of it, the Corps of Engineers has developed a public park with campsites, recreation areas and a swimming beach (Merrisach Park). The park is approached by an oiled road from the east, through a main gate which is never closed, and which leads out to the swimming beach, where an oiled parking lot is provided. The beach area is protected from erosion by a wooden wall about four feet high, extending to the lake bottom on the water side and to about six inches above the beach on the land side. The park makes no charge for public daytime use, including the swimming beach. It does charge a user fee to overnight campers. The beach is unlighted, and although the park advertises a closing hour of 10:00 P.M., its gate is never closed and no one is on duty during the nighttime hours.

The beach consists of fill sand behind the wall, but the lake side of the beach is deep alluvial silt. (The park is at the south end of the Dismal Swamp.) Lock No. 2 affects the level of the lake to a minor degree, causing not more

than a six inch variance. Dam number 2 controls more extreme changes of water level at the beach.

Merrisach Park was opened in 1969

The retaining wall was constructed in 1973

The ladder was installed in 1975

Bittner fractured his spine at the site April 1978

Soon after the park opened, a sign was put up at the gate area which discussed swimming, and which gave no hint of the dangerous condition. That sign still is in place (Plaintiff's Exhibit 7A).

The regulation quoted in the sign was amended to include the words "at one's own risk" (Reg. 327.5), and as so amended was printed in a visitor's handout, this done in 1979

Tracy Carson fractured his spine at the site May 15, 1984

William Lance McNeely fractured his spine at the site May 15, 1984

Two "danger" signs were installed at the beach site (Defendant's Exhibit 2) March 04, 1985

Timothy Moore fractured his spine at the site on Memorial day, May 27, 1985

A vivid danger sign was installed in the park (Plaintiff's Exhibit 17A) 1986

On May 14, 1984, at DeWitt, Arkansas, about fourteen miles north of Merrisach Park, the Plaintiff, Lance McNeely and his friend Tracy Carson, both about nineteen years old, spent the day idling around the town and the nearby countryside. Tracy was AWOL from the Navy. His excuse was that he had family problems with his parents and younger sister. Both deny any daytime drinking. Early in the evening the young people of DeWitt

gathered at Fergusons parking lot. There they met Kenneth Steward, a year or two older than they. He was disposed to celebrate because he had just joined the Air Force. By agreement, about 10:00 P.M. they gathered at the trailer home of Lance's father, and there got into Kenneth's car. Kenneth drove. Kim sat beside him. Lance sat in the left rear seat. Connie Goggans sat in the middle. Tracy sat in the right rear seat. They "more or less wandered" to Merrisach. Kenneth had a one liter bottle half full of whisky and it was passed around. Kenneth had a few shots and admitted to being a "little high." Lance had possibly four shots but was not high. "Lance had Connie on his mind, not drinking." Kim and Connie had little or nothing to drink. They ended up at the north end of the parking lot, backing the car into the end slot at about midnight. Tracy, the extra man in the back seat, soon slipped out of the car, stripped to his shorts, and dove into the swimming area to the left of the ladder. Kim got out of the front seat and followed Tracy to the beach. She ran back to the car screaming that Tracy was hurt. The others jumped from the car. Kenneth ran to the beach where he sensed that Lance had stripped off his heavy clothing and run past him, also to the left of the ladder, and dived in. Both bodies were visible half floating, face down, and being carried by the current out into the canal, downstream.

Both incapacitated men were rescued. Tracy was unconscious. Kenneth used mouth to mouth resuscitation to revive him. Lance was conscious, felt a tingling in his legs, stomach and neck pains, could not move his legs, and had little control of his arms.

All four of the injured people had in common these elements:

a. They took a running dive to the southwest from where they parked their car.

b. They heard their spine snap at the instant of fracture.

c. Their head and face was embedded in the soft mud of the bottom.

Lance's principal injury was a crushing and fracture between the seventh cervix and the first thoracic vertebra, rendering him with little sensitivity and no positive control of his body organs or his limbs below his armpits. In addition, his second cervical vertebra was fractured when his head was snapped back (a hangman's fracture). Both men were transported to the hospital by ambulance.

DISCUSSION

The theories of Plaintiff's case all revolve around the Arkansas Recreational Use Statute. It is found in Ark. Stat. Ann., Title 18, Chapter 11, Subchapter 3. The relevant portions of the statute include:

> 18-11-301. PURPOSE.
>
> The purpose of this subchapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.
>
> 18-11-302. Definitions.
>
> As used in this subchapter, unless the context otherwise requires:

(1) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty;

(2) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises;

(3) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof:

(C) Swimming;

(N) Any other activity undertaken for exercise education, relaxation, or pleasure on land owned by another;

(4) "Charge" means an admission fee for permission to go upon or use the land, but does not include:

(B) Contributions in kind, services, or cach paid to reduce or offset costs and eliminate losses from recreational use.

18-11-304. Duty to care.

Except as specifically recognized by or provided in § 18-11-307, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.

18-11-305. Owner's immunity from liability.

Except as specifically recognized by or provided in § 18-11-307, an owner of land who, either directly or indirectly, invites or permits without charge any person to use his property for recreational purposes does not thereby:

(1) Extend any assurance that the lands or premises are safe for any purpose;

(2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons;

(4) Assume responsibility for or incur liability for injury to the person or property caused by any natural or artificial condition, structure, or personal property on the land.

18-11-307. Exceptions to owner's immunity.

Nothing in this subchapter limits in any way liability which otherwise exists:

(1) For malicious, but not mere negligent, failure to warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous; and

(2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for recreational use thereof, except that, in the case of land leased to the state, a subdivision thereof, or to a third person, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

Plaintiff advanced three basic theories to support his claim that Defendant is liable despite the protection afforded by the Recreational Use Statute, they are:

1. That the land, having been developed for recreational purposes was outside the area of protection afforded by the statute; or

2. That since a camping fee was charged, the provisions of 18-11-307 (2) apply and the owner's liability is not limited by the statute because the owner charged a fee for the recreational use; or

3. That the provisions of 18-11-307 (1) apply, an in in

. . .

this case malicious, but not merely negligent, failure to guard or warn against an ultra-hazardous condition, structure, use, or activity actually known to the owner to have existed, did in fact occur.

As to the claim that development of the park took the case outside the protection of the Recreational Use Statute because:

> Recreation Use of Land and Water Access Act is intended for those who permit open lands to be used recreationally on a casual basis. But those who hold their property out to the public for recreational purposes, and maintain their property for recreational use . . . are not entitled to the asserted protection of the [Act]. *Miller v. United States*, 442 F.Supp. 555 (N.D. Ill. 1976)

The Eighth Circuit has already determined that the Arkansas Recreational Use Statute affords protection to the United States the same as any other owner of land. *Mandel v. United States*, 719 F.2d 963 (8th Cir. 1983). *Note*

On the facts as presented to the Eighth Circuit, *Mandel* I dealt with open lands used for recreation on a casual basis, i.e., Mud Cave on the Buffalo River, and it might appear that

Note: *"Mandel"* has produced three published cases. They are:

Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982)

Mandel v. United States, 719 F.2d 963 (8th Cir. 1983) *"Mandel* I

Mandel v. United States, 793 F.2d 964 (8th Cir. 1986) *"Mandel* I

the reasoning of *Miller*, supra, was applicable. But a review of the Arkansas statute convinces this Court otherwise. 18-11-302 defines "land" to include roads, water, watercourses, structures and equipment when attached to the realty. And 18-11-304 provides that the owner has no duty to give warning of a dangerous condition, use, structure, or activity to persons entering for recreational purposes. This language clearly anticipates improvement, and even improvements for recreational purposes. So I conclude that the reasoning of *Miller*, supra, is not applicable, given the specific language of the Arkansas Recreational Use Statute.

As to the claim that the imposition of a camper fee negated the protection of the Arkansas Recreational Use Statute, § 18-11-307 resolves this problem: It provides that the statute offers no protection to the owner when the owner "charges" for the recreational use thereof. And § 18-11-302 (4) defines "charge" so as not to include:

> (B) Cash paid to reduce or offset costs and eliminate losses from recreational use.

The evidence established that charges were only levied on overnight campers. In fact, an agent of the Corps of Engineers testified that it was against the policy of the Corps of Engineers to charge an entrance or recreation fee. Lance McNeely and his group were not charged for

the recreational use of the park. I conclude that the exception applicable to "charge" does not defeat the protection afforded the Defendant under the statute.

There remains the claim that the Plaintiff is entitled to recover under the exception contained in A.C.A. § 18-11-307 (1):

> For malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous.

Prior to 1983, Ark. Stat. Ann. § 50-1106 (now A.C.A. § 18-11-307 (1) provided that the owner's immunity did not extend to liability which otherwise existed for "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The 1983 amendments to A.C.A. § 18-11-307 (1) may be presented this way:

> . . . ~~willful or~~ malicious *but not mere negligent*
>
> failure to guard or warn against ~~a dangerous~~ an *ultra hazardous* condition, structure, personal property, use or activity *actually known to such owner to be dangerous.*

The changes are made in Act 168 by the 1983 Arkansas Legislature and entitled "An Act to Amend [ACA § 18-11-307 (1)] to Clarify the Limitation on the Liability of Landowners for Allowing Persons to Use Their Land;. . . ."

As changed the statute requires that these elements be established as more likely so than not so if liability will result:

A. That defendant's conduct was "malicious, but not mere negligent."

B. That there was a failure to guard or warn against an ultra hazardous condition, structure, personal property, use, or activity.

C. That such condition, structure, use, or activity was actually known to the owner to be dangerous.

D. The causal relationship.

A. What did the legislature mean when it changed the language from "willfull or malicious failure to guard" to "malicious, but not mere negligent failure to guard"?

If the language change was simply to clarify the statute, as its title suggests, then the standard of care as stated in AMI 1101, i.e., "actual or deliberate intention to harm or which if not intentional, shows an utter indifference to or conscious disregard for the safety of others," is as applicable to the amended statute as it was to the original statute. *See Mandel v. United States*, 545 F.Supp. 907, at 911 (W.D. Ark. 1982).

If in fact the intent of the amendment was to impose a more severe standard, as the Defendant asserts, then we must look elsewhere to define that standard. Given the relationship in time between *Mandel* I and the legislative action, I accept the defense position that the phrase "malicious, but not mere negligent," meant malicious, and no less than malicious. But "malicious" is a subjective state of mind and its proof, absent a confession, can only be established by the marshalling of objectively

established facts. The pattern of proof necessary to establish malice has been discussed by the Arkansas Supreme Court in punitive damage cases and in this language:

> Before a verdict for exemplary damages is justified, the party to be charged must be guilty of . . . conscious indifference to consequences from which malice will be inferred. *Satterfield v. Ford*, 485 S.W.2d 192, 253 Ark. 181 (1972), *Bruns v. Bruns*, 719 S.W.2d 691, 290 Ark. 347 (1986)

I find there is substantial evidence of "conscious indifference to consequences from which malice" must "be inferred." The United States acting through the Corps of Engineers, in its layout, construction, and administration of the swimming area paid little or no attention to any of the most elemental safety standards. Since 1951, top water safety professionals in the Unites States, including the Corps of Engineers personnel have been members of the National Water Safety Congress and have participated in the promulgation of standards. In 1979 a standards committee was appointed, and in 1982 the nine member committee included four Corps of Engineers members. The standards, published as of April 1983 (see Plaintiff's exhibits 21 and 26), are presented by the authors as minimal standards. Applying the standards to the Merrisach swimming area as of May 14-15, 1984, this Court finds:

As constructed, with the platformed retaining wall, the ladder suggestive of substantial depth, and murky river water (which made walking on a hidden bottom precarious), shallow diving was invited rather than deterred. The water depth outside the retaining wall averaged 2½ feet, and was subject to fairly rapid 6" draw

downs, i.e., 1/5th of the already inadequate depth could be lost in a few hours. There were no depth gauges installed in the swimming area. These conditions violated Sections 2.4 and 2.43, Planning, design, operation and maintenance of inland water swimming beaches, The National Water Safety Congress (1982). There were absolutely no warning signs as to swimming or diving posted at the time of the accident. This violated the standards of Section 6.1.1, Planning, design, etc, supra. There were no beach regulations posted in the beach area, except as to trash and pets (Plaintiff's exhibit 12). This violated the standards in Sections 6.1.1 and 6.1.10, Planning, design, etc., supra.

There was no emergency communication system from the beach, this violated the standards in Section 6.2.3, Planning, design, etc., supra.

And these standards had been adopted by the Corps of Engineers.

A witness for the Plaintiff, a Dr. Gabrielson, whose terminal degree is in recreation administration, in addition to the defects recited above, reported that the average number of spinal cord injuries each year is 8000 and 10% them or 800 are the result of diving, and 3/4 of that figure, or 600 each year are from diving into natural bodies of water. He further testified that the swimming place was defective because it was not clearly defined, it was not fenced, or otherwise limited so that its use for swimming could be controlled. It was not lighted, although it was well known by the Corps of Engineers that it was used at night. It had no proper approach to the water, that is, the retaining wall, and ladder invited

rather than discouraged diving. A broad open walkway into the water would have been proper. The beach area, even as it was marked at the time of the Moore incident did not have warning signs which complied with those mandated by Section XIII of the Project Resources Management Plan for the park (Plaintiff's exhibit 19).

This litany of open and obvious defects, easily apparent to any qualified administrator of a recreational area, compels this Court to conclude that the swimming area as constructed and maintained demonstrated, on the part of the Corps of Engineers, a conscious indifference to consequences from which malice must be inferred.

B. and C. This Court also concludes that there was a failure to guard and a failure to warn against the condition, which was so extreme as to be an ultra-hazardous condition. As to the question of actual notice, there is no question that the administrators, including the Park Rangers knew of the condition, because they all testified as to examining the area and their familiarity with it.

The Deputy Sheriff, who by agreement with the Corps of Engineers patrolled the park, testified that he often saw diving, that he warned the Park Rangers of the hazardous nature of the swimming area.

Bittner, the man who fractured his spine in 1978, testified that some months later, when he returned to the park a Ranger came to him and opened a conversation with an inquiry if he was the fellow who got hurt.

The obvious nature of the hazards, coupled with the repeated presence of Rangers and administrators at the swimming area, even without the evidence of specific

conversations as to the dangerous nature of the structures and area, convinces this Court that responsible personnel of the Corps of Engineers had actual knowledge of the danger.

D. There is no real issue as to the causal relationship between the conditions and the injury.

One matter was raised in defense. It was that Lance McNeely was not engaged in a recreational activity when he ran and dived to rescue his friend. But McNeely was in the park as part of the group recreational activity, and Tracy Carson was engaged in the recreation of swimming when he was hurt. Nor can Lance McNeely be charged with negligence for attempting a running dive in order to reach Tracy Carson, who was unconscious and floating out into the canal. Given the circumstances, his conduct was well within the standard of care set out in AMI 616, that is:

> ATTEMPTED RESCUE - NEGLIGENCE
>
> A person acting under stress in response to humanitarian impulses, in attempting to rescue another who reasonably appears to be in danger of substantial injury or loss of life, is not chargeable with negligence because his conduct may now appear to have been unwise, unless his conduct was rash and reckless. He is required to use only that degree of care a reasonably careful person would use under the same or similar circumstances.

DAMAGES

Plaintiff claimed damages for lost wages, past and future, and for medical expenses, past and future. Each of

the parties called an economist to testify as to the extent of Plaintiff's damages and the present value thereof.

The testimony of both the economists regarding lost wages was inconclusive. Plaintiff is a young man with a very brief earning history. He had been schooled as a diesel mechanic, but had not yet obtained employment in that field. Thus, there existed the possibility of a life of employment in a well-paying trade, but no certainty that he would ever actually enter the field. Both economists could only speculate as to the probable earnings that Plaintiff would have earned but for the injury.

It appears to the Court that Plaintiff is a person who would have earned enough to provide for himself and those dependent on him. After subtracting the amounts he would have had to spend to purchase some necessities provided for in another element of damages, the Court finds that the sum of $340,000.00 is the present value of Plaintiff's lost wages, past and future.

Plaintiff included is his claim for future medical costs the amounts he reasonably expected to pay for special equipment, vehicles, etc. The Court would prefer to consider those items separately. After subtracting out those items, the Court finds that Plaintiff has had medical expenses to date in the amount of $76,000.00 and that the present value of his future medical expenses is $310,000.00.

Dr. Venus, the economist called by the Defendant, considered the special medical equipment needed in the future, such items as special modification of Plaintiff's home and van, as a separate item of damages. Dr. Venus

found the amount of each anticipated cost and then determined when it would occur. He then calculated the amount of money that would have to be invested today to provide enough money to pay each of those costs at the time of their occurrence and projected the costs forward through the Plaintiff's life expectancy. The Court considers that this method of computing these costs is valid, and finds this element of damages to be the sum of $254,700.00.

Therefore,

IT IS ORDERED that judgment be entered in favor of the Plaintiff and against the Defendant in the amount of $980,700.00

Dated this 23 day of May, 1988.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2355

Dewitt Bank & Trust Company, Conservator of the Estate of William Lance McNeely, Appellee, v. United States of America, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 13, 1989
Filed: June 26, 1989

Before FAGG, Circuit Judge, ROSS, and TIMBERS, *Senior Circuit Judges.

FAGG, Circuit Judge.

The government appeals the district court's judgment awarding damages to William Lance McNeely under the

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*The HONORABLE WILLIAM H. TIMBERS, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674 (1982). We reverse.

As part of a multiple purpose project, the United States Army Corps of Engineers (Corps) built a dam that expanded Merrisach Lake in Arkansas. To prevent park land from eroding into the project, the Corps constructed a retaining wall along the shore. The Corps created a sand beach behind the retaining wall. Beyond the retaining wall, the water level is shallow. The level fluctuates as the Corps retains or releases water incidental to the flood control and navigational functions of the project.

Late one night, McNeely dove into the water from the retaining wall. He was seriously injured when his head struck the lake bottom. McNeely then brought this FTCA action. After a bench trial, the district court found the government liable. The district court concluded the Corps failed to protect McNeely from the shallow waters.

On appeal, the government claims it is immune from damages under a provision of the Flood Control Act of 1928, 33 U.S.C. § 702c (1982). We agree. Although the district court did not address this jurisdictional defense, the question of sovereign immunity may be raised for the first time on appeal. *United States v. Johnson*, 853 F.2d 619, 622 n.7 (8th Cir. 1988).

Section 702c provides: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." 33 U.S.C. § 702c. Under this section, "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the [g]overnment from 'any' liability associated with flood control." *United States v. James*, 478 U.S.

597, 608 (1986) (citing *National Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954)). This immunity shields the government from tort claims arising from construction or management of federal flood control projects. *Id.* at 605, 610, 612; *E. Ritter & Co. v. Department of the Army, Corps of Eng'rs*, Nos. 88-1368/1399, slip op. at 6-7 (8th Cir. May 3, 1989).

Flood control was an essential component of the multiple purpose project that expanded Merrisach Lake. *See* Rivers and Harbors Act of 1946, Pub. L. No. 525, 60 Stat. 634, 635-36 (1946); S. Rep. No. 1508, 79th Cong., 2d Sess. 32-33 (1946); H.R. Rep. No. 2009, 79th Cong., 2d Sess. 28-29 (1946); H.R. Doc. No. 758, 79th Cong., 2d Sess. 1-3, 6-8, 11-12, 36-41, 94-96, 106, 117 (1947). Thus, the lake's waters are "contained in * * * a federal flood control project for purposes of or related to flood control." *James*, 478 U.S. at 605; *see McCarthy v. United States*, 850 F.2d 558, 562 (9th Cir. 1988) (section 702c applies to multiple purpose flood control projects), *cert denied*, 109 S. Ct. 1312 (1989); *Portis v. Folk Constr. Co.*, 694 F.2d 520, 522-23 (8th Cir. 1982) (same).

McNeely argues section 702c does not apply because his injuries resulted from the project's recreational, rather than its flood control, operations. We disagree.

McNeely was injured by diving into the shallow waters of a federal flood control project. In operating the project for flood control and navigation, the Corps maintained the waters at this shallow level. Thus, governmental control of flood waters was a substantial factor in causing McNeely's injuries. *See McCarthy*, 850 F.2d at 561-62; *id.* at 562 (Immunity applies "[s]o long as * * *

[the] injury is related to the use of [the federal flood control] project."). While the Corps may have been negligent in failing to warn McNeely of the water level fluctuations, "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project," *James*, 478 U.S. at 610. *Compare Denham v. United States*, 646 F. Supp. 1021, 1026 (W.D. Tex. 1986) (diver struck a submerged obstacle that was unrelated to flood control), *aff'd*, 834 F.2d 518, 523 (5th Cir. 1987) (section 702c immunity issue not appealed).

Because the government is immune under section 702c, we reverse and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2355EA

Dewitt Bank & Trust Company, etc.,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion For Rehearing En Banc
vs.	*	
United States of America,	*	
Appellant.	*	

Appellee's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

September 7, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
FEB 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-829

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEWITT BANK AND TRUST COMPANY, CONSERVATOR OF THE ESTATE OF WILLIAM LANCE MCNEELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's action under the Federal Tort Claims Act for damages arising from injuries suffered in a lake that is part of a multi-purpose federal project whose functions include flood control.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-829

DEWITT BANK AND TRUST COMPANY,
CONSERVATOR OF THE ESTATE OF
WILLIAM LANCE MCNEELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-21) is reported at 878 F.2d 246. The opinion of the district court (Pet. App. 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1989. A petition for rehearing was denied on September 7, 1989 (Pet. App. 22). The petition for a writ of certiorari was filed on November 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the conservator of the estate of William Lance McNeely. McNeely was seriously injured when he dove into Merrisach Lake in Arkansas and struck his head on the lake bottom. Pet. App. 4, 19.

Though it was once a natural body of water, Merrisach Lake has been modified as part of the McClellan Kerr Project. The purposes of this project include flood control and the improvement of navigation on the Arkansas River. In connection with the McClellan Kerr Project, the Army Corps of Engineers routed a canal through Merrisach Lake and constructed a dam and a lock in its vicinity. The water impounded by the dam and lock has increased the boundaries and altered the configuration of Merrisach Lake. Pet. App. 1-2, 19.

McNeely was injured at Merrisach Park, a park developed by the Corps of Engineers on the shore of the lake. To prevent erosion of the lake shore, the Corps built a retaining wall along the water's edge. The water at the base of the retaining wall is shallow; its precise level fluctuates as the Corps retains or releases water at the nearby lock and dam. McNeely was injured when he dove from the retaining wall into the lake late at night during an attempt to rescue a friend. Pet. App. 19.

2. Petitioner filed this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Eastern District of Arkansas. After a trial, the district court concluded that the government was liable for McNeely's injuries and

awarded damages totalling $980,700 against the United States. Pet. App. 1-17.[1]

3. The court of appeals reversed, holding that the government was immune from liability under the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. 18-21.[2] Quoting from this Court's decision in *United States* v. *James*, 478 U.S. 597, 608 (1986), the panel noted that Section 702c was intended "to ensure beyond doubt that sovereign immunity would protect the [g]overnment from 'any' liability associated with flood control." Pet. App. 19. Thus, the court continued, the immunity conferred by that statute "shields the government from tort claims arising from construction or management of federal flood control projects." *Id.* at 20. The court pointed out that "[f]lood control was an essential component of the multiple purpose project that expanded Merrisach Lake" and concluded, accordingly, that the lake's waters were "flood waters" for purposes of the statute – *i.e.*, waters "contained in

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[1] The district court's opinion focused on the Arkansas Recreational Use Statute, Ark. Code Ann. § 18-11-301 *et seq.* (1987), which generally exempts operators of recreational facilities from liability for negligence. The court concluded that this case fell within an exception to the statute that permits recovery in the event of a "malicious, but not mere negligent, failure to warn against an ultra-hazardous condition, structure, personal property, use or activity actually known to such owner to be dangerous." Pet. App. 5-15.

[2] The government did not plead the Flood Control Act as a defense in its answer to the complaint, but did raise that defense in its trial brief. The district court did not address the applicability of the statute. The court of appeals noted that the Flood Control Act presented a jurisdictional defense and thus considered it on appeal. Pet. App. 19.

* * * a federal flood control project for purposes of or related to flood control." *Ibid.* (quoting *James*, 478 U.S. at 605). Finally, the court rejected petitioner's argument that Section 702c did not apply because McNeely's injuries resulted from the project's recreational, rather than flood control, operations. Pet. App. 20.[3]

ARGUMENT

1. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." In *James*, this Court held that the terms "flood" and "flood waters" (478 U.S. at 605):

> apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

In this case, it is established that flood control is among the purposes of the McClellan Kerr Project. The district court noted that this multi-purpose project was undertaken "[i]n order to keep the channel [of the Arkansas River] open and exercise some flood control." Pet. App. 1. Likewise, the court of appeals held that "[f]lood control was an essential component of the multiple purpose project that expanded Merrisach

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[3] In this portion of its opinion, the court observed that "[i]n operating the project for flood control and navigation," the Corps maintained the waters in Merrisach Lake at the shallow level at which they stood at the time of the accident. In fact, the lock and dam that regulate the level of the lake are navigational works. But, as noted above, the lake is part of a multi-purpose project, one of whose major purposes is flood control.

Lake." Pet. App. 20. In its present configuration, therefore, Merrisach Lake undoubtedly consists of "waters contained in or carried through a federal flood control project" and falls squarely within *James*' definition of "flood waters."

Because Merrisach Lake is part of a multi-purpose project whose functions include flood control, there is no conflict between the decision in this case and *Graci* v. *United States*, 456 F.2d 20 (5th Cir. 1971), cert. denied, 412 U.S. 928 (1973). See Pet. 17-19. In *Graci*, owners of property along the Mississippi River-Gulf Outlet, a navigation project constructed by the Corps of Engineers to provide a short-cut from the Gulf of Mexico to New Orleans, sought to recover for damages suffered when hurricane-driven waters overflowed the outlet and flooded their property. The government did not contend that the project had any flood control function, 456 F.2d at 22, and the Fifth Circuit noted that the question presented by Section 702c was whether that statute protected the United States from liability that was "*unconnected with flood control projects*," *id.* at 26 (emphasis in original). See *James*, 478 U.S. at 601-602 n.2 (*Graci* held that Section 702c "conferred immunity only for floods or flood waters connected with a flood control project"). The project at issue here is not "unconnected" with flood control.[4]

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[4] *James* establishes that Section 702c is applicable to a multi-purpose project – *i.e.*, one whose functions include, but are not limited to, flood control. In both of the cases that the Court decided in *James*, the plaintiffs were engaged in recreational activities on waters included in federal flood control projects at the time they were injured. 478 U.S. at 599, 601. Indeed, in one of the cases, the plaintiffs cited literature in which the

2. This is one of three cases since *James* in which the courts of appeals have held that the government is immune under Section 702c from claims arising from alleged negligence in connection with the operation of recreational facilities located on lakes included in flood control projects. See *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989); *Dawson* v. *United States*, No. 89-3371 (3d Cir. Jan. 16, 1990). All three decisions have concluded that the waters included in such lakes are "flood waters" for purposes of Section 702c and thus that the government is entitled to immunity under the statute. Pet. App. 19-21; *McCarthy* v. *United States*, 850 F.2d at 561-563; *Dawson* v. *United States*, slip op. 5-6.[5] These courts have also refused to allow plaintiffs to avoid Section 702c's reservation of sovereign immunity by

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government had promoted the recreational features of a flood control lake. *Id.* at 599. Before *James*, numerous decisions had applied Section 702c to multi-purpose projects. See *Aetna Ins. Co.* v. *United States*, 628 F.2d 1201, 1203 (9th Cir. 1980) (collecting cases), cert. denied, 450 U.S. 1025 (1981).

[5] In *McCarthy*, the plaintiff was seriously injured when he dove into shallow water at a recreational area on a lake created as part of a flood control project. He alleged that the government had been negligent in the manner in which it constructed and maintained the recreational area in which the injury occurred, in encouraging swimming and diving there, and in failing to warn of its hazardous condition. The Ninth Circuit affirmed the dismissal of the complaint. Contrary to petitioner's contention (Pet. 19-20), there is no significant factual distinction between *McCarthy* and this case.

Similarly, in *Dawson*, the Third Circuit affirmed the dismissal of two actions arising from drownings at a swimming area in a flood control lake.

casting their claims in terms of a failure to warn or by arguing that their injuries have arisen from operations wholly unrelated to flood control. Pet. App. 20; *McCarthy* v. *United States*, 850 F.2d at 561-563; *Dawson* v. *United States*, slip op. 7-8.

Similarly, in *Mocklin* v. *Orleans Levee District*, 877 F.2d 427 (1989), the Fifth Circuit held that Section 702c barred a claim against the government arising out of a drowning in a channel that had been dredged to facilitate the movement of equipment needed for the construction of flood control levees. The court reasoned that the water in the channel was "flood water" as that term had been construed in *James*, that the presence of the water had contributed to the drowning, and that the government was therefore immune. The panel rejected the claim, analogous to petitioner's here, that the death was unrelated to a flood control project because it was attributable to channels that had been "negligently designed for navigation." 877 F.2d 430 n.6.

Although in *James* the recreational users of flood control lakes were injured or killed by releases of water through federal dams, the reasoning of the Court in that case supports the decision here and the other circuit-level decisions that have upheld the government's immunity under Section 702c. *James* emphasized that the government's immunity under that provision extends to liability of "*any* kind * * * for *any* damage from or by floods or flood waters at *any* place," adding that it is "difficult to imagine broader language." 478 U.S. at 604 (emphasis in original). The legislative history, the Court noted, shows "that the sweeping language of § 702c was no drafting inadvertence" and that "Congress clearly sought to ensure beyond doubt that

sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608. The Court made clear that Section 702c extends to claims framed in terms of failures to warn recreational users of hazards on flood control lakes, explaining that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." 478 U.S. at 609-610. Finally, with respect to claims targeted at the allegedly recreational aspects of a flood control project, one of the court of appeals decisions reversed in *James* had held that the government was not immune if "a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or flood waters * * *." *James* v. *United States*, 760 F.2d 590, 603 (5th Cir. 1985).

Contrary to petitioner's contention (Pet 11-15), there is no conflict between the decision in this case and that in *Denham* v. *United States*, 834 F.2d 518 (5th Cir. 1987). Although the district court in *Denham* held that Section 702c did not bar a suit against the government by a recreational user of a flood control lake, the issue was not raised on appeal and the Fifth Circuit had no occasion to consider it. The language that petitioner quotes from the Fifth Circuit's opinion in *Denham* (Pet. 11) addressed only the applicability of the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a). 834 F.2d at 521. All references to Section 702c that are quoted in the petition (Pet. 11-12) are from the district court's opinion.

In a recent decision not cited in the petition, the Tenth Circuit has declined to extend the government's

immunity under Section 702c to a recreational injury in a multi-purpose flood control lake. *Boyd* v. *United States*, 881 F.2d 895 (1989). In that case, a swimmer snorkeling in a flood control lake was injured by a power boat; his complaint alleged that the government was negligent in failing to warn swimmers that boating was permitted in the area in which the accident occurred and in failing to zone the lake to prohibit boating in that area. The court of appeals reversed a decision dismissing the complaint on the basis of the discretionary function exception, remanded for further consideration of a state recreational use statute similar to the one involved in this case, and held that Section 702c did not bar the suit. With respect to Section 702c, the Tenth Circuit stated that "Congress' concern was to shield the government from liability associated with flood control operations * * * not liability associated with operating a recreational facility." It held that "[w]ithout attempting to delineate for every conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case * * * the requisite nexus has not been established." 881 F.2d at 900.

The court in *Boyd* was critical of the reasoning of *McCarthy*, 881 F.2d at 900 & n.6, and adopted a more limited view of Section 702c than that applied in *McCarthy*, *Dawson*, or this case. But while *Boyd* held that Section 702c requires some "link" or "nexus" (881 F.2d at 900) between flood control activities and a plaintiff's injuries, the panel expressly declined to establish any general standard to govern that question.

Thus, it is unclear how broadly the Tenth Circuit may read *Boyd* in the future.[6]

The court of appeals' decision in this case is consistent with *James*, a case in which, less than four years ago, this Court applied Section 702c to injuries arising from recreational activities. With the exception of *Boyd*, in which the panel focused on the particular facts and declined to articulate any general standard, no court of appeals decision after *James* has reached a different conclusion. Under these circumstances, we submit that the issue of Section 702c's applicability to accidents of the type at issue here does not now warrant this Court's attention.

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[6] Any conflict between the court of appeals' decision and *Hayes* v. *United States*, 585 F.2d 701 (4th Cir. 1978), does not warrant this Court's review. In *Hayes*, a decision that predated *James*, the Fourth Circuit, in a two-page opinion, purported to recognize a distinction between those operations of a multi-purpose project that are related to its flood control function and those that are not. 585 F.2d at 702-703. To the extent that the brief opinion in *Hayes* might be read to support petitioner's claim, the decision must be deemed to have been qualified by *James*. As noted above, *James* emphasized the breadth of Section 702c's plain language and legislative history, confirming that Congress's intention was to protect the government "from 'any' liability associated with flood control." 478 U.S. at 608. Any suggestion to the contrary in *Hayes* would have to yield to this Court's reading in *James* of the plain language of Section 702c. Although the Court's opinion in *James* included a reference to *Hayes* (and an accompanying parenthetical) in a string citation in a footnote (478 U.S. at 605-606 n.7), the same footnote cited with approval to *Morici Corp.* v. *United States*, 681 F.2d 645, 647-648 (1982), in which the Ninth Circuit specifically rejected the *Hayes* court's suggestion that immunity depends on "the particular use to which the project was being put when the negligence occurred." *Id.* at 677.

3. Contrary to petitioner's suggestion (Pet. 20-21), the court of appeals' decision did not entail any improper review of the district court's findings of fact. The district court noted – and there can be no genuine dispute – that the functions of the McClellan Kerr Project include flood control. Pet. App. 1, 2-3. In substance, the court of appeals held that this undisputed fact was sufficient to establish the government's entitlement to immunity under Section 702c. This case therefore does not present any question concerning the application of Fed. R. Civ. P. 52's well-established standard for appellate review of findings of fact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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